IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CROWN, CORK & SEAL COMPANY, INC.	:	**CIVIL ACTION**
	:	
v.	:	
	:	
EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY	:	**No. 99-4904**

M E M O R A N D U M

WALDMAN, J. **October 17, 2001**

This action arises out of a settlement agreement between plaintiff and defendant ("the Agreement") which was intended to resolve all issues pertaining to insurance coverage for plaintiff's asbestos bodily injury liabilities under defendant's primary and excess insurance policies. The Agreement provided that defendant would pay a pro rata share of indemnity costs, defense costs and service fees relating to asbestos litigation.

Plaintiff has asserted a claim for breach of contract, alleging that defendant has refused to pay service fees required under the Agreement and subsequent amendments. At issue is whether the service fees eroded the aggregate limits under the excess insurance policies and, if not, whether defendant's decision to reduce the service fee was justified.

The pertinent facts are essentially undisputed, although the parties obviously disagree on the conclusion to be drawn from them. The record presented is voluminous. For purposes of the instant motion, of course, the evidence is viewed most favorably to plaintiff.

Defendant insured plaintiff under four consecutive primary policies from May 1, 1970 through May 1, 1974 ("primary policies"). These policies provide that defendant would pay "all sums which the insured shall become legally obligated to pay as damages because of ... bodily injury or ... property damage ... caused by an occurrence." Under the primary policies, defendant is obligated to pay a total aggregate limit of $300,000 per policy for asbestos bodily injury claims, for a total of $1.2 million in aggregate primary limits.

The primary policies also provide that defendant "shall have the right and the duty to defend any suit against the insured seeking damages on account of such bodily injury" and that costs of defending such suits do not erode the aggregate limits. The policies further state that "in addition to the applicable limit of liability, [defendant will pay]... (a) all expenses incurred by defendant ... (d) reasonable expenses incurred by the insured at the company's request in assisting the company in the investigation or defense of any claim or suit."

Plaintiff was also insured by defendant under four consecutive excess coverage policies ("excess policies") issued for the period May 1, 1970 to May 1, 1974. The policies for the periods May 1, 1970 through May 1, 1972 provide that defendant will pay "all sums which the insured shall become obligated to pay ... because of personal injury or property damage, and all

expenses incurred by the insured or the company." These policies define such expenses as those "incurred by the insured or the company in connection with the investigation, negotiation, adjustment, settlement, and defense of any claims or suits alleging personal injury or property damage." These policies limit defendant's liability to loss in excess of the amount recoverable under the primary policies. The total coverage under the policies is $5 million.

The excess policies for the periods May 1, 1972 through May 1, 1974 also contain a Defense of Suits endorsement which provides that the company will defend plaintiff. The endorsement states that the expenses incurred under the endorsement "shall be totaled with the amount of such judgment or settlement for the purpose of determining the liability of the Company in excess of the retained limit." Defense expenses are defined as "all reasonable expenses... incurred by the insured or the company as provided in the insuring agreement of this policy with respect to the investigation, defense or settlement of claims or suits." Under these policies, the liability limit is also $5 million.

Due to its purchase of another company, plaintiff began to be named as a defendant in asbestos bodily injury actions starting in 1977 or 1978. Plaintiff had previously hired ESIS Corporation to handle such claims. After a dispute, plaintiff terminated the relationship with ESIS and contracted with

Coleman, Inc. ("Coleman"). Under the contract between Coleman and plaintiff (the "1980 Administrative Agreement"), Coleman acted as Administrator for the asbestos bodily injury claims, maintained and made disbursements in all asbestos actions and maintained information about each claim. The 1980 Administrative Agreement provided that Coleman would receive a service fee of $75.00 per claimant.

In 1978, plaintiff initiated an insurance coverage action against defendant and plaintiff's other insurers in the Philadelphia Court of Common Pleas to determine the insurers' obligation to defend and indemnify plaintiff for the asbestos bodily injury claims. During the pendency of the litigation, plaintiff, defendant and another insurer entered into an Interim Funding Agreement on January 15, 1980 ("1980 IFA") which provided that the insurers would partially reimburse plaintiff for the costs, including service fees, it was incurring in connection with the asbestos claims. Under the 1980 IFA, plaintiff and Coleman would jointly administer the claims. Defendant agreed to pay 16.7% of all costs and expenses which plaintiff was obligated to pay Coleman under the 1980 Administrative Agreement. Plaintiff paid 70.8% of such costs and the remainder was paid by the other insurer. The 1980 IFA also included a provision that if it were later determined that some of the payments made by an insurer to plaintiff were not payable under the insurance

policies, the payments would be deemed loans to be repaid by plaintiff within thirty days of a final judicial determination. An additional insurer joined the IFA in 1982 and an Addendum was entered into between plaintiff and the insurer incorporating by reference the terms of 1980 IFA.

Plaintiff filed an Amended Petition for Declaratory Judgment in December 1980 in the Court of Common Pleas litigation seeking all defense, settlement and judgment costs incurred in connection with the asbestos claims. Plaintiff successfully moved in 1983 for partial summary judgment on the issue of the insurers' obligations to reimburse plaintiff's indemnity costs, defense costs and service fees under the primary and excess policies. Plaintiff then filed a Motion for Entry of Money Judgment and billed defendant for service fees of $37,500 in the first billing statement submitted to the court.

Plaintiff, defendant and other insurers then entered into a new Interim Funding Agreement ("1983 IFA") under which defendant agreed to pay 25% of "all costs which Crown was required to pay Coleman" under the 1980 Administrative Agreement, which included service fees. Plaintiff was required to pay 25% of such costs. The 1983 IFA also included the loan provision.

In 1985, the Court of Common Pleas litigation was finally resolved by the Agreement. The Agreement provided that the insurers would pay a pro rata share of indemnity costs,

defense costs and service fees. Under the Agreement, plaintiff's primary insurance carriers would provide coverage up to a certain amount and once those coverages were exhausted, plaintiff's excess insurers would provide coverage until the excess limits were reached. Pursuant to an Amendment dated October 30, 1986, plaintiff was substituted for Coleman as Administrator and has served in that capacity since that time.

On August 1, 1986, Robert Reeder, one of plaintiff's attorneys, circulated to defendant and its other insurers a proposed Property Damage Agreement providing for allocation of costs, including "administrative costs," incurred by plaintiff in connection with asbestos property damage claims.[1] The proposed Property Damage Agreement provided that plaintiff would perform all duties and administer the defense of the property damage actions "consistent with the prior practice by Crown under the various Interim Funding Agreements and Final Settlement Agreement between Crown and its carriers in the asbestos related personal injury litigation between Crown and its carriers."

Like the Agreement, the proposed Property Damage Agreement created separate allocation schemes for plaintiff's primary and excess coverage. Under the primary coverage scheme, insurers would pay a fixed percentage of "past and future legal

[1]Defendant also provided asbestos property damage coverage to plaintiff under the primary and excess policies.

defense fees, administrative costs and related costs and expenses" incurred by plaintiff. The proposed Property Damage Agreement also provided that payment of the fees and costs would not erode the primary coverage limits. Likewise, under the excess coverage scheme, the insurers would pay fixed percentages of "legal defense fees, administrative costs and related costs and expenses." The proposed Property Damage Agreement, however, did not contain an express provision prohibiting the reduction of excess aggregate limits through the payment of defense and administrative costs. A later version of the proposed Property Damage Agreement eliminated all reference to any excess coverage scheme. This version retained the provision prohibiting the erosion of primary aggregate limits by defense and administrative costs.

In October 1988, after plaintiff was substituted as Administrator, it increased the service fee to $104.50 per claimant. Defendant challenged this fee and remitted payments representing its pro rata share of a $40 service fee, which it later raised to $60.

Plaintiff claims that defendant effectively breached the 1985 Agreement by applying service fees against the aggregate limits of the excess policies it had issued.

Defendant initially contends that plaintiff is precluded by judicial estoppel from asserting that service fees

exhaust the aggregate limits of the excess policies because it asserted in the Court of Common Pleas litigation that administrative fees were part of the coverage. In its briefs in that litigation, plaintiff stated that it only sought enforcement of the terms of the insurance policies but requested "costs of defense and settlement" as damages. It also included administrative fees in the billing statements submitted with its Motion for Money Judgment in the litigation.

Judicial estoppel applies only when a party presently takes a position inconsistent with its past position and has asserted either or both positions in bad faith, with an intent to "play fast and loose" with the court. Klein v. Stahl GMBH & Co. Maschinefabrik, 185 F.3d 98, 111 (3d Cir. 1999).

While plaintiff's submissions in the Court of Common Pleas litigation suggest that plaintiff considered the administrative fees to be included in the coverage of the excess policies, plaintiff did not explicitly make that claim. The litigation involved the insurers' duty to defend and indemnify plaintiff. The treatment of service fees or administrative costs was not integral to that litigation and is not mentioned in the Court's opinion of August 2, 1983. While plaintiff sought to recover administrative fees in its Motion for Money Judgment, its position arguably was only that the fees represented consequential losses. The court will not apply judicial estoppel

to preclude plaintiff from claiming that the service fees should not erode the aggregate limits of the excess policies.

Both parties rely on extrinsic evidence to support their interpretations of the Agreement. Defendant relies on the excess policies in question, the primary policies, the 1980 and 1983 IFAs, the proposed Property Damage Agreement, correspondence between the parties and deposition testimony of several witnesses. Plaintiff relies on the Agreement, the testimony of Robert Reeder, Joseph Gerber, Richard Krzyzanowski and Richard Poirier, and an October 21, 1996 letter from Mr. Poirier to Mr. Reeder.

Plaintiff contends that the primary and excess policies, the 1980 and 1983 IFAs and the proposed Property Damage Agreement should not be considered because they are parole evidence and thus barred by the Agreement's integration clause. When a contract is ambiguous, the court must consider extrinsic evidence to discern its meaning. See In re New Valley Corp., 89 F.3d 143, 150 (3d Cir. 1996). The presence of an integration clause will not preclude the court from examining extrinsic evidence to interpret an ambiguous contract. See Mellon Bank, N.A. v. Aetna Business Credit, Inc., 619 F.2d 1001, 1010, n.9 (3d Cir. 1980); Shulman v. Continental Bank, 513 F. Supp. 979, 986 (E.D. Pa. 1981). This includes parole evidence. See id.; Matthews v. Unisource Worldwide, Inc., 748 A.2d 219, 222 (Pa.

Super. 2000); Samuel Rappaport Family P'ship v. Meridian Bank, 657 A.2d 17, 21 (Pa. Super. 1995).

Plaintiff's reliance on the testimony of Messrs. Reeder, Gerber and Krzyzanowksi is misplaced. Although they testified to their understanding that service fees would not erode the aggregate limits of the excess policies, there is no competent evidence that this understanding was communicated to or appreciated by defendant's representatives during the negotiations.[2] Indeed, Robert Britton, who represented defendant in the negotiations and drafting, as well as Messrs. Gerber and Reeder, testified that the matter of whether service fees would exhaust the aggregate limits of the excess coverage was never discussed during negotiations. The subjective understanding of Messrs. Gerber and Reeder do not illuminate the issue of the parties' intent.[3] See Brokers Title Co. v. St. Paul Fire & Marine Ins. Co., 610 F.2d 1174, 1181 (3d Cir. 1979) (subjective understanding of party to contract not controlling unless other party knew of such meaning); Celley v. Mutual Benefit Health & Accident Ass'n, 324 A.2d 430, 435 (Pa. Super. 1974) (uncommunicated subjective understanding or intent of one party

[2]Mr. Krzyzanowksi, plaintiff's General Counsel, did not participate in the negotiations or drafting of the Agreement.

[3]Mr. Britton contradicts Messrs. Gerber and Reeder in testifying that the negotiation participants did not contemplate that the excess coverage would be triggered.

to a contract is irrelevant and inadmissible when interpreting the contract); Lyons v. Cantor, 70 A.2d 285, 287 (Pa. 1950) (unexpressed intent of one party to contract does not bear on parties' intent when interpreting contract).

Plaintiff finally contends Mr. Poirier's statement in the October 21, 1996 letter that the insurers were being asked "to shoulder [costs] for the Administrator" and his similar deposition testimony regarding the service fees indicate that defendant understood it would ultimately bear the service fees. When asked about the use of the term "shoulder," however, Mr. Poirier stated that he only meant that the insurers had to carry the charges for the service fees regardless of whether or not the fees eroded the aggregate limits. Thus, the use of the word "shoulder" by defendant's representative is not probative of the parties' intent.

The Agreement also does not substantiate plaintiff's claim that the parties intended that the service fees would not exhaust the excess limits. To the contrary, several provisions support defendant's position.[4]

[4]Plaintiff argues that the Agreement should be construed against defendant because it is an insurer. The Agreement is not an insurance policy, however, but a contract. Moreover, it is the product of extensive negotiations between sophisticated parties equally well-versed in the subject matter. Indeed, as even Mr. Gerber testified, plaintiff had the upper hand during the negotiations process as it had successfully moved for summary judgment.

Paragraph 9(d) provides that "any payment made pursuant to the terms of this Settlement Agreement shall be applied toward the exhaustion of the aggregate limits of each respective Settling Insurance Carrier's policies as provided in this Settlement Agreement." This indicates a general intent for the payments to exhaust the coverage limits. Similarly, paragraph 12(g) states that "all past and future Indemnity Costs, Asbestos Claim Defense Costs and Service Fees incurred ... shall be allocated proportionately to each Settling Insurance Carrier's remaining unexpended limits."

The absence of a provision detailing the treatment of defense costs and service fees under the excess coverage also indicates that the parties understood the fees would erode the excess limits. Paragraph 13(b) of the Agreement denotes the point at which the insurers would cease to be obligated to pay defense costs and service fees under the primary coverage, but the Agreement contains no corresponding provision for excess coverage.

The excess policies themselves are highly relevant to the intent of the parties to the Agreement. J. Scott Walters, defendant's director of asbestos claims, testified that the Agreement did not cover all issues but had to refer to the policies. Mr. Britton stated that the coverage of the policies played a "large part" in negotiations. Mr. Britton further

testified that if the obligations of the insurers under the excess policies had been changed, it would have been enunciated in the 1985 Agreement.

The structure of the Agreement itself shows that it was intended to track the coverage provided by the underlying primary and excess policies. Indeed, the limits in the Agreement mirror those in the policies and simimlarly separates the primary and excess blocks.

The first two excess policies which were in effect from May 1, 1970 to May 1, 1972 cover "expenses incurred by insured or the company in connection with the investigation, negotiation, adjustment, settlement and defense of any claims or suits." Similarly, the latter two excess policies cover "expenses incurred with respect to the investigation, defense or settlement of claims or suits." Service fees were intended to compensate plaintiff as Administrator for its costs in investigating, defending and settling the asbestos claims.[5] Thus, under the policy language, the administrative costs covered by the service fees would be included in the coverage as defense costs.

The proposed Property Damage Agreement circulated by plaintiff's counsel also indicates that plaintiff understood that

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[5]Plaintiff contends that "defense costs" under the excess policies does not include service fees because defense costs would not cover defendant's overhead or internal cost of maintaining files. The service fees do not represent defendant's expenses in these areas, however, but rather the costs of plaintiff's actions as Administrator. Indeed, defendant duplicated in its own files some of the information also maintained by plaintiff.

administrative fees would be covered by the excess policies. The proposed Property Damage Agreement, which was based on the same primary and excess policies as the Agreement, explicitly provided that several types of costs including administrative fees would not reduce the aggregate limits of the primary policies but contained no parallel provision concerning whether certain costs and administrative fees exhausted the excess limits. That plaintiff's counsel did not insert a parallel provision strongly suggests that he understood the administrative fees would erode the limits under the excess policies.

The loan provisions of the 1980 and 1983 IFAs also indicate that the policies covered service fees. If service fees were not included in the coverage of the primary and excess policies, repayment of the service fees would not have been at issue when the coverage dispute was resolved unfavorably to defendant.

That the excess policies covered service fees is highly probative of the intent of the parties in the Agreement to allow them to erode the aggregate limits. The parties have treated all other costs about which the Agreement is silent in accordance with the underlying policies. Although the Agreement is silent regarding the exhaustion of the primary aggregate limits by future indemnity costs, defense costs and service fees, both parties agree that future indemnity costs erode the aggregate

limits while defense costs and service fees do not. This treatment is consistent with the primary policies. Similarly, the Agreement does not address the treatment of future indemnity costs and service fees under the excess policies, but does discuss the application of defense costs. The parties both agree that future indemnity costs erode the aggregate excess limits under the Agreement, again consistent with the excess policies. The parties intended to treat the service fees as the excess policies provided.

The November 18, 1988 letter from Richard Krzyzanowski, plaintiff's General Counsel, to Martin Mullen, an employee of defendant who handled plaintiff's account, further indicates that the service fees should erode the excess limits. The letter concerns plaintiff's billing statement of fees, expenses and settlements to defendant and details the amount owed by defendant. It states that the balance of defense costs and service fees paid by defendant after exhausting the primary coverage limits, a balance of $ 655,236.47, would be deductible from the excess insurance coverage block.

Even when viewing the pertinent evidence in a light most favorable to plaintiff, the only reasonable conclusion is that the parties intended service fees to exhaust the excess aggregate limits. Defendant is thus entitled to summary judgment on this claim.

As the service fees erode the aggregate limits of the subject excess policies, the question of whether defendant was justified in reducing the fee amounts is immaterial. The parties have stipulated that defendant exhausted the aggregate limits of the subject excess policies if service fees are determined to erode the excess limits. The issue of whether defendant breached the contract by reducing the service fee amounts is thus moot.[6]

Accordingly, defendant's motion will be granted. An appropriate order will be entered.

[6]Defendant's counterclaim for a declaration that the services fees erode the aggregate excess limits and that its reduction of the fee amounts was justified is similarly moot and will be dismissed as such.

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A MUTUAL COMPANY	:	**No. 99-4904**

O R D E R

ACCORDINGLY, this day of October, 2001, upon consideration of defendant's Motion for Summary Judgment (Doc. #23) and plaintiff's response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that defendant's Motion is **GRANTED**, defendant's counterclaim is **DISMISSED** as moot, and **JUDGMENT IS ENTERED** in the above action for the defendant.

BY THE COURT:

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JAY C. WALDMAN, J.